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Privacy and the Post-September 11 Immigration Detainees: The Wrong Way to a Right (and Other Wrongs)

SADIQ REZA*

[The detainees] can make their identity public, if they wish to.¹

Amnesty International is concerned that some [post-9/11] detainees have been held under such secrecy that their families and lawyers [have] had great difficulty in locating their whereabouts and in taking the necessary steps in order to provide them with the assistance and support they are entitled to under national and international law. Some have experienced weeks and months of delay before being notified of what charges they are being held under—and whether the charges are criminal or INS related. . . .

. . . .

. . . [F]amily members . . . for weeks . . . have been unable to establish if and where their loved ones were being held. Lawyers have also had difficulty trying to establish where their clients are held or when they have a hearing before the immigration court. . . .

. . . .

. . . [T]here were many [early] reports of detainees . . . being held effectively “incommunicado” in the initial stages after arrest,

* Associate Professor, New York Law School; J.D., Harvard Law School; A.B., Princeton University. Gene Cerruti, Steve Ellmann, and Lenni Benson gave invaluable guidance and comments. Gia DiCola, Balin Baidwan, and Rezwan Ahmed provided first-rate research assistance, and Doris Alcivar rendered her characteristic superb administrative aid.

¹ Attorney General John Ashcroft, Attorney General Ashcroft Provides Total Number of Federal Criminal Charges and INS Detainees (Nov. 27, 2001) [hereinafter Ashcroft], http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11_27.htm (on file with the Connecticut Law Review).

*as relatives and attorneys searched for their whereabouts. Information . . . indicates that detainees' ability to maintain contact with the outside world has been a persistent problem, extending far beyond the initial period of detention . . . Some detainees have reported problems in understanding their rights and how to exercise them due to language difficulties.*²

Privacy was the first reason the Department of Justice ("DOJ") gave publicly for withholding the names of individuals detained for immigration violations as a result of post-September 11, 2001 ("post-9/11") federal law-enforcement initiatives.³ Soon thereafter, the DOJ released the names of those detainees who were charged with criminal violations, and gave top billing to a different reason for continuing to withhold the names of those charged only with immigration violations: the desire not to aid Osama bin Laden and his Al-Qaeda network by revealing which of their alleged associates were in United States custody.⁴ But privacy remains one of the DOJ's arguments for continuing to withhold the identities of post-9/11 immigration detainees.⁵ Privacy, of course, is a creature of many different

² AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: AMNESTY INTERNATIONAL'S CONCERNS REGARDING POST SEPTEMBER 11 DETENTIONS IN THE USA 5, 7, 15-16 (Mar. 2002) [hereinafter AMNESTY INTERNATIONAL REPORT], available at [http://web.amnesty.org/aidoc/aidoc_pdf.nsf/index/AMR510442002ENGLISH/\\$File/AMR5104402.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/index/AMR510442002ENGLISH/$File/AMR5104402.pdf) (on file with the Connecticut Law Review).

³ See James Risen & David Johnston, *Tape Reveals Wild Struggle on Flight 93*, N.Y. TIMES, Sept. 22, 2001, at B1 (noting that identifying information in documents about post-9/11 detainees released by the DOJ had been deleted "for privacy reasons"); Neil A. Lewis & David Johnston, *Jubilant Calls on Sept. 11 Led to F.B.I. Arrests*, N.Y. TIMES, Oct. 28, 2001, at A1 (citing DOJ spokesperson's statement that "privacy issues must [first] be resolved" with respect to information about post-9/11 detainees).

⁴ See Ashcroft, *supra* note 1 (discussing both rationales); DOJ Oversight: *Preserving Our Freedoms While Defending Against Terrorism: Hearing on Review of Military Terrorism Tribunals Before the S. Judiciary Comm.*, 107th Cong. (2001), Fed. News Serv., Nov. 28, 2001, LEXIS, Legis Library, Fednews File (statement of Michael Chertoff, Assistant Attorney General, Criminal Division, U.S. Department of Justice) [hereinafter Chertoff Testimony] (same).

⁵ See Memorandum in Support of Defendant's Motion for Summary Judgment, Center for Nat'l Security Studies v. U.S. Dep't of Justice, No. 01-2500 (D.D.C. Jan. 11, 2002) [hereinafter DOJ FOIA Memorandum], at 23-24:

DOJ's decision to withhold the requested information is necessary in order to protect the privacy interests of the detainees themselves. The detainees—many of whom have or may be cleared [sic] of any wrongdoing—have strong privacy interests in preventing disclosure of certain information about themselves and their locations. Release of information regarding the detainees could forever stigmatize them by associating them with the worst terrorist incident in United States history, even if the detainees are ultimately cleared of any wrongdoing. . . . [T]he mere mention of the detainees' names in connection with these [post-9/11] investigations may likely cause the detainees embarrassment, humiliation, risk of retaliation, harassment and possibly even physical harm in the United States and in their home countries.

See also Defendants' Emergency Motion for Stay Pending Appeal and for Expedited Appeal, *Detroit Free Press v. Ashcroft*, No. 02-70339, at 17 (6th Cir. Apr. 9, 2002) (arguing that closure of immigration proceedings of post-9/11 detainees is necessary to "avoid stigmatizing" the detainees since "the mere

species in our law, spawned in federal and state judicial opinions, nourished by statutes, and thriving in doctrinal areas as different from one another as copyright law and criminal procedure. The DOJ grounds its privacy argument in the "personal privacy" exemption to the Freedom of Information Act ("FOIA"), which authorizes the government to withhold information when disclosure might constitute "an unwarranted invasion of privacy";⁶ this is a privacy interest of the "informational privacy" genus that Warren and Brandeis conceived and Prosser later helped enshrine in the common-law tort of invasion of privacy by "public disclosure of private facts."⁷ In its modern form, this privacy interest is seen as an individual's interest in controlling information about himself.⁸ Thus, the DOJ defends withholding the names of post-9/11 detainees on the ground that releasing them would violate the detainees' right to control information about themselves.

In forthcoming work, I argue that this common-law privacy right should indeed attach to individuals arrested for or suspected of *crime*.⁹ I also argue that support for the right exists in a variety of judicial, statutory, and other sources, and that legislation to formally protect the right is war-

mention of [their] names in connection with [post-9/11] investigations may likely cause [them] embarrassment, humiliation" and other possible harm). "Immigration detainees" comprise the largest of the three categories of post-9/11 detainees; the other two categories are detainees charged criminally, whose names the DOJ has mostly released, and those held as material witnesses, information about whom the DOJ has stated is sealed by court order. See DOJ FOIA Memorandum, *supra*, at 8-11; see also Second Supplemental Declaration of James S. Reynolds, Center for Nat'l Security Studies v. U.S. Dep't of Justice, No. 01-2500 (D.D.C. Apr. 15, 2002) (explaining that information about some criminally-charged detainees is sealed by court order). The DOJ's other arguments for withholding the detainees' names, which this Article does not address, invoke concerns about national security and public safety—*viz.*, that releasing the names would compromise the government's post-9/11 terrorism investigations by, among other things, revealing the nature and scope of the investigations; that the safety of Americans would be endangered as a result; and that detainees themselves (and their families and attorneys) might suffer in the United States or abroad as possible informants against terrorist associates. See DOJ FOIA Memorandum, *supra*, at 14-23; see also *infra* note 20.

⁶ 5 U.S.C. § 552(b)(7) (2000).

⁷ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960); RESTATEMENT (SECOND) OF TORTS § 652(D) (invasion of privacy action lies when one "gives publicity to a matter concerning the private life of another . . . if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public").

⁸ See, e.g., U.S. Dep't of Justice v. Reporters Comm. For Freedom of the Press, 489 U.S. 749, 763 (1989) ("[B]oth the common law and the literal understanding of privacy encompass the individual's control over information concerning his or her person."). It is thus distinct from constitutional species of privacy: the fundamental right of personal autonomy affirmed in cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of married couples to obtain and use contraceptives) and *Roe v. Wade*, 410 U.S. 113 (1973) (right of woman to terminate pregnancy), often called "decisional privacy," and privacy interests protected by the Fourth Amendment's ban on unreasonable searches and seizures and, in at least some views, the Fifth Amendment privilege against compulsory self-incrimination, see, e.g., William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1020-25 (1995) (identifying those interests).

⁹ Sadiq Reza, *Privacy and the Criminal Arrestee or Suspect* (forthcoming 2002).

ranted and constitutional. The reasoning is simple: being publicly named in connection with criminal allegations is stigmatizing, and the resultant personal harm—social, professional, emotional, other—lasts, and is difficult to justify when it is visited upon someone who is acquitted of the charges or against whom the charges are dismissed. Equally troubling is that criminal arrestees and suspects are routinely named by police officials, before a judge, or even a prosecutor, has considered the charges or the evidence underlying them. I therefore urge, in the criminal context, legislation that (1) forbids government agents from identifying arrestees or suspects until at least probable cause of guilt is found by a judge or grand jury, unless the arrestees or suspects request otherwise, and (2) declares those portions of government records that identify arrestees or suspects “non-public” until such a finding is made. Such legislation would resemble some of the statutory provisions that now protect the identities of sexual assault complainants from public disclosure in some thirty states.¹⁰ The proposal is, ultimately, for a right of temporary anonymity for criminal arrestees and suspects, waivable by the arrestees or suspects themselves and expiring at a threshold that is well-established as a trigger for the deprivation of rights in the criminal context: a judicial determination of probable cause of guilt.

Seen through this lens, the withholding of the names of the *criminal* accusees among the post-9/11 detainees by the DOJ on privacy grounds before a probable cause determination is reached is justifiable. Indeed, the stigma of criminal accusation can only be greater with respect to post-9/11 detainees, particularly those charged with crimes related to the September 11 attacks, given the horror of that day and the breadth and intensity of the public’s attention to the ensuing law-enforcement efforts. Similar reasoning could support withholding the names of post-9/11 detainees accused only of immigration violations. The DOJ has in fact based its privacy argument on the very stigma and related harms that post-9/11 immigration detainees might suffer from being named in relation to post-9/11 law-enforcement efforts.¹¹ But the DOJ’s argument is problematic for several reasons. First, the DOJ’s decision to withhold the names of post-9/11 immigration detainees does not rest on the wishes of the detainees; the DOJ refuses to name them *whether or not* they wish to be named. While many detainees might prefer anonymity, the latest reports suggest that at least some might wish to be named.¹² And although DOJ officials state that detainees can “name themselves” if they wish, all indications are that the

¹⁰ See, e.g., N.Y. CIV. RIGHTS LAW § 50-(b) (McKinney 1992 & Supp. 2001). For a listing of statutes from each state, see Jonathan B. Mintz, *The Remains of Privacy’s Disclosure Tort: An Explanation of the Private Domain*, 55 MD. L. REV. 425, 433 & n.40 (1996).

¹¹ See DOJ FOIA Memorandum, *supra* note 5, at 23-24.

¹² See *infra* text accompanying note 32.

government has significantly impaired detainees' ability to do just that, by limiting detainees' access to lawyers, family members, telephones, and other means of communication with the public.¹³ By deciding on its own not to name detainees, and by impairing detainees' ability to name themselves, the DOJ thus does not necessarily advance a legitimate privacy interest of the detainees, but it certainly inverts one: the essence of personal privacy is an *individual's* ability to control information about himself. Moreover, with respect to any detainee who wishes to be named, FOIA's personal privacy exemption does not justify withholding his name since naming him would not, by definition, invade his privacy. Finally, and most disturbing, the latest reports suggest that the DOJ's privacy argument, along with the DOJ's other arguments for withholding detainees' names, has worked to deprive detainees of a plethora of procedural rights that are basic to our notions of due process and protected by domestic and international rules.¹⁴ In this way detainees' privacy interest has not only been inverted, but perverted. In the end, the impression is inescapable that the DOJ has withheld the names of post-9/11 detainees not to protect personal privacy but to promote government secrecy. Whatever justifications there may be for such secrecy, the result has been an unprecedented and unacceptable degree of official non-accountability with respect to the detainees.

This Article accordingly argues that post-9/11 immigration detainees may indeed have a privacy interest that justifies the withholding of their names, but the DOJ has deprived them of that interest by deciding on its own to withhold the names and substantially impairing detainees' ability to name themselves. Worse, the DOJ's false privacy rationale has apparently contributed to depriving the detainees of a plethora of other rights. Part I defines the applicable privacy interest and exposes the fallacies of the DOJ's privacy argument. Part II draws the link between the DOJ's privacy argument and the deprivation of other rights of the detainees. Part III proposes that the DOJ vindicate the detainees' privacy interest the right way: by determining the detainees' wishes and naming or not naming them according to those wishes.

I. THE ARGUMENT FOR PERSONAL PRIVACY

The essence of personal privacy of the "informational privacy" genus is one's control over the dissemination of information about her. The concern is that an individual be able to keep others from giving publicity to "private facts" about her—her criminal past, financial or medical informa-

¹³ See *infra* text accompanying notes 34-39.

¹⁴ See discussion *infra* Part II.

tion, personal habits and more.¹⁵ Applied to the names of individuals detained by the government, the argument is that the fact of one's arrest upon merely an accusation of wrongdoing is "private," at least insofar as the detainee's *identity* is concerned, and disclosure of her name would cause her embarrassment or offense (or worse) and would serve no legitimate public interest. This, again, is precisely the DOJ's privacy argument with respect to the post-9/11 immigration detainees.¹⁶

No statute, rule, or court decision prohibits the naming of individuals detained or arrested for immigration violations on the grounds of personal privacy—or at least none did until the DOJ created one in April 2002.¹⁷ Attorney General Ashcroft initially asserted that such a law existed,¹⁸ but both he and a DOJ subordinate subsequently admitted in Congressional testimony that none did.¹⁹ Nevertheless, in response to a lawsuit seeking the names of the detainees under FOIA, the DOJ has argued that privacy concerns justify withholding the names of post-9/11 immigration detainees

¹⁵ See, e.g., John A. Jurata, Jr., *The Tort that Refuses to Go Away: The Reemergence of Public Disclosure of Private Facts*, 36 SAN DIEGO L. REV. 489 (1999) (chronicling the evolution of the "private facts" tort and surveying its applications).

¹⁶ See DOJ FOIA Memorandum, *supra* note 5, at 23-24.

¹⁷ See 67 Fed. Reg. 19,508, 19,509-19,510 (Apr. 22, 2002) (to be codified at 8 C.F.R. § 236.6) (citing concerns about detainee privacy and national security to justify new rule barring disclosure of names of immigration detainees and any other information about them) (citing, *inter alia*, 28 C.F.R. § 513.34(b)) (barring disclosure of "[l]ists of Bureau [of Prisons] inmates" on grounds of "individual privacy"); see also *infra* note 20. Otherwise, immigration hearings are open to the public, though judges may limit or bar attendees because of space limitations, or "[to] protect[] witnesses, parties, or the public interest." 8 C.F.R. §§ 3.27 & 240.10; cf. *Kashani v. INS*, 547 F.2d 376, 380 (7th Cir. 1977) (noting discretionary authority under analogous predecessor rules to close deportation hearing to protect safety of alien who alleged fear of persecution in home country). Applicants for *asylum* do, however, categorically receive confidential treatment, through a rule forbidding public disclosure of information "contained in or pertaining to" their applications. 8 C.F.R. § 208.6 (2001); cf. *Guevara Flores v. INS*, 786 F.2d 1242, 1251-52 (5th Cir. 1986) (discussing rule in context of applicant who alleged fear of persecution in home country). Proceedings concerning "abused alien spouse[s]" and "abused alien child[ren]" are also closed to the public. 8 C.F.R. § 3.27(c) (2002). And exclusion hearings—hearings to determine an alien's admissibility under now-superseded rules—are also closed. 8 C.F.R. §§ 3.27 & 240.32 (2002); see CHARLES GORDON ET. AL., IMMIGRATION LAW AND PROCEDURE § 64.01 (Rev. ed. 2001) (explaining elimination of "deportation" and "exclusion" distinction by creation, pursuant to Illegal Immigration Reform and Immigrant Responsibility Act of 1996, of uniform "removal" proceedings for immigration cases beginning on or after April 1, 1997). The DOJ has also sought to withhold information about post-9/11 immigration proceedings by means of two other post-9/11 directives that do not expressly invoke privacy concerns; see *infra* note 20.

¹⁸ See Attorney General John Ashcroft, Attorney General Ashcroft Announces the Appointment of the Special Master to Administer the September 11 Victim Compensation Fund, at 5 (Nov. 26, 2001), available at http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11_27.htm (on file with the Connecticut Law Review):

It would be a violation of the privacy rights of individuals for me to create some kind of list of all of [the detainees who] are being held. . . . The law properly prevents the department from creating a public black list of detainees that would violate their rights.

¹⁹ See U.S. Senator Patrick Leahy (D-VT) Holds Hearing on Anti-Terrorism Policy: Hearing on Anti-Terrorism Policy Before the S. Judiciary Comm., 107th Cong. (2001), Fed. News Serv., Nov. 28, 2001, LEXIS, Legis Library, Fednews File (statement of John Ashcroft, United States Attorney General); Chertoff Testimony, *supra* note 4.

because of the stigma and related harms the detainees may suffer from being named.²⁰ The DOJ grounds this argument in FOIA Exemption 7(C), which allows the government to withhold information "compiled for law enforcement purposes" when the information "could reasonably be expected to constitute an unwarranted invasion of personal privacy."²¹ The statute does not define what information the exemption covers; the matter is therefore left for the courts to decide, and for us to explore in the meantime.

An individual may very well be harmed by public knowledge of her arrest for alleged immigration violations in the same ways she might be harmed by public knowledge of her arrest for alleged criminal behavior—embarrassed by the accusation of wrongdoing, her family members shunned, her future job prospects threatened, and her social status damaged. And we can safely assume that any possible harm from public knowledge of immigration accusations is both more likely to ensue and more serious in our post-9/11 world. I would therefore argue that, for privacy reasons, the DOJ may very well be entitled, indeed perhaps should be

²⁰ See DOJ FOIA Memorandum, *supra* note 5, at 23-24. The DOJ has made the same argument, so far unsuccessfully, in three other lawsuits that challenge the withholding of information about post-9/11 detainees. See *ACLU v. County of Hudson*, No. 82D-L-463-02, at 9 (Super. Ct. N.J. March 26, 2002) (seeking information about post-9/11 detainees held in New Jersey state facilities under state's "right to know" laws) (granting summary judgment for plaintiffs), available at <http://www.judiciary.state.nj.us/ditalia/aclu.htm> (on file with the Connecticut Law Review); *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, 947 (E.D. Mich. 2002) (seeking public access to immigration proceedings involving particular post-9/11 detainee) (granting preliminary injunction for plaintiffs); *North Jersey Media Group, Inc. v. Ashcroft*, 205 F. Supp. 2d 288, 301 (D. N.J. 2002) (seeking public access to immigration proceedings involving post-9/11 detainees) (granting preliminary injunction for plaintiffs). The latter two suits challenge a much-maligned post-9/11 directive detailing "additional security procedures" for immigration hearings involving post-9/11 detainees, including closing the courtroom to the public and not releasing any information about the case. See Memorandum from Michael Creppy, Chief U.S. Immigration Judge, on Cases Requiring Special Procedures, to All Immigration Judges and Court Administrators (Sept. 21, 2001), http://www.aclu.org/court/creppy_memo.pdf [hereinafter Creppy Memorandum]. The DOJ's new regulation forbidding public disclosures of information about all immigration detainees, including their names, see *supra* note 17, was apparently issued in response to these two suits. Meanwhile, even more apparently in direct response to the pending suits, a freshly-minted rule allows immigration judges to issue protective orders to bar immigration respondents and their attorneys from divulging information about immigration proceedings. See 67 Fed. Reg. 36,799, 36,802 (May 28, 2002) (to be codified at 8 C.F.R. § 3.46); cf. *Detroit Free Press*, 195 F. Supp. 2d at 948 (finding DOJ's asserted interests in closing post-9/11 immigration proceedings insufficient to support closure because, *inter alia*, "the Government [does not] prohibit detainees . . . (or their counsel or families) from revealing . . . information [about the proceedings] to the press and public."); *North Jersey Media Group*, 205 F. Supp. 2d at 301 ("[T]here is nothing . . . to prevent disclosure of . . . information by the . . . detainee or that individual's lawyer").

²¹ 5 U.S.C. § 552(b)(7)(C) (2000). The DOJ's other arguments for withholding the names, see *supra* note 5, rest on two other FOIA exemptions: the exemptions for information that "could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. § 552(b)(7)(A), and for information that "could reasonably be expected to endanger the life or physical safety of any individual," *id.* § 552(b)(7)(F). DOJ FOIA Memorandum, *supra* note 5, at 14-23.

required, to initially withhold the names of post-9/11 immigration detainees—at least until the “master calendar hearing,” when an administrative judge first sees an immigration detainee and reviews the charges against her, and the detainee informs the judge whether she concedes her deportability or plans to contest it.²² But the DOJ should withhold a detainee’s name on privacy grounds *only if the detainee desires anonymity*. Conversely, *if a detainee desires publicity, she should be able to achieve it*—through the government’s release of her name or by other means.²³

²² Alas, no statute or regulation defines a “master calendar hearing” or specifies how soon after arrest it must take place, how it must be conducted, or precisely what must occur during it. Immigration judges themselves are uncertain about the definition and requirements of the hearing. See, e.g., *In re Cordova*, No. A91 432 440, 1999 WL 590719, at *3 (BIA Aug. 6, 1999) (interim decision):

Neither the [Immigration and Nationality] Act nor the regulations define a “master calendar hearing.” However, we understand such a hearing to be a preliminary stage of the proceedings at which, even though little or no testimony is taken, the Immigration Judge has great flexibility to identify issues, make preliminary determinations of possible eligibility for relief, resolve uncontested matters, and schedule further hearings. In addition, this is the stage of the proceedings at which the Immigration Judge generally ensures that an alien has been advised of his or her rights under the Act and applicable regulations, including rights to apply for relief, and has been given notice and warnings regarding his or her obligation to attend future hearings, file applications and evidence in a timely manner, and otherwise cooperate with orders of the Immigration Court.

Id. See also *In re Arguelles*, No. A73 000 231, 1999 WL 360383, at *10 (BIA June 7, 1999) (interim decision) (Grant, Board Member, concurring):

[A]liens may be confused—as apparently are Members of this Board on occasion—as to exactly what constitutes a “master calendar” hearing. The term is not defined in the regulations. In some jurisdictions, virtually all merits cases are preceded by the type of “master calendar” that most closely resembles a “docket call” or “status call” in state and federal trial courts. In other venues, cases are efficiently disposed of during the first and only appearance before an Immigration Judge. . . . I would . . . suggest that at each hearing, Immigration Judges state for the record what type of hearing is occurring—a master calendar or an individual merits hearing.

Such a hearing clearly should take place, however. See 8 C.F.R. § 240.26(b)(1)(i)(A) (2002) (requiring alien’s request for voluntary departure instead of deportation to be made at or before “the master calendar hearing at which the case is initially calendared for a merits hearing”).

²³ Given the comparatively less procedural protection accorded immigration arrestees, the proposition that the government should be required to release an arrestee’s name if she wishes is arguably stronger in the immigration context than in the criminal context. A necessary premise of the privacy protection I urge in the criminal context is that criminal arrestees, through constitutional requirements such as court-appointed counsel and a prompt judicial probable-cause hearing after a warrantless arrest, have the ability to publicize their status if they wish. Immigration arrestees do not enjoy the same protections: there is no analogous right to court-appointed counsel in immigration proceedings, nor is judicial review required before or after an immigration arrest. See 8 U.S.C. § 1362 (2000) (statutory right to counsel in removal proceedings only “at no expense to the Government”); 8 U.S.C. § 1226(a) (2000) (authorizing arrest and detention of aliens upon warrant issued by Attorney General); 8 C.F.R. § 287.5(e)(2) (listing titles of immigration officers empowered to issue and execute arrest warrants); 8 U.S.C. § 1357(a)(2) (2000) (warrantless arrests of aliens reviewed by immigration officers); *United States v. Encarnacion*, 239 F.3d 395 (1st Cir. 2001) (judicial hearing not required until criminal charges filed against alien arrested for immigration violations); *but see* 8 U.S.C. § 1534(c)(1) (2000) (statutory right to court-appointed counsel in “alien terrorist” removal proceedings). This is all the more true with respect to post-9/11 immigration detainees, with the procedural rights of immigration arrestees lowered even further since September 11. See, e.g., *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No.

Both of these propositions stem from the very essence of informational privacy. The first proposition—that the DOJ should withhold a name only if the detainee so desires—is axiomatic; only the detainee's interest in anonymity triggers the relevant privacy interest to begin with. The second proposition—that a detainee should be able to disclose her name effectively if she wishes—rests on the idea that privacy means not merely an individual's ability to *withhold* personal information, but something broader: an individual's *choice of whether or not* to withhold personal information, and when and to whom to disclose it if she chooses to.²⁴ In this sense, informational privacy is about more than just protecting against embarrassment or indignity; it is about vindicating one's *autonomy*—one's *control* over information about herself, in the words that constitute its standard definition.²⁵ This is in fact the precise interpretation that at least one court has given the privacy interest protected by FOIA Exemption 7(C).²⁶ A detainee's privacy-as-autonomy interest is served only when *she* decides whether or not the fact of her detention should be publicized. The DOJ should therefore base any decision to withhold a detainee's name on privacy grounds only on the wishes of that detainee.

In fact, the DOJ cannot use Exemption 7(C) to withhold the name of any immigration detainee who wishes to be named. Published cases that consider whether the exemption covers the identities of individuals detained by the government while awaiting the filing or resolution of criminal or immigration charges are virtually nonexistent.²⁷ Courts have, how-

107-56, 115 Stat. 272 (2001), § 412(a) (codified at 8 U.S.C. § 1226a (2001)) (allowing detention of non-citizen arrestees suspected of terrorism for up to seven days before criminal or immigration charges are filed, and indefinitely thereafter); 66 Fed. Reg. 48,334 (Sept. 20, 2001) (codified at 8 U.S.C. § 287.3 (Sept. 17, 2001)) (extending period by which immigration charges must be filed after arrest from twenty-four hours to forty-eight hours, and allowing immigration detention without charge for "reasonable period of time" beyond forty-eight hours in "emergency or other extraordinary circumstance"); see also Administrative Comment, *Indefinite Detention Without Probable Cause: A Comment on INS Interim Rule 8 C.F.R. § 287.3*, 26 N.Y.U. REV. L. & SOC. CHANGE 397 (2000-2001) (arguing that immigration detention without charge beyond twenty-four hours under post-9/11 detention regulation violates Fourth Amendment and due process rights).

²⁴ See, e.g., Jean L. Cohen, *The Necessity of Privacy*, SOC. RES. (2001), at 319 ("Privacy rights do not silence; instead they protect communicative liberty: the freedom to choose whether, when and with whom one will discuss intimate matters.") (arguing for a constitutional right to privacy).

²⁵ See *supra* note 8 and accompanying text.

²⁶ See *Jones v. FBI*, 41 F.3d 238, 247 (3d Cir. 1998) ("Exemption 7(C) leaves the decision about publicity—whether and how much to reveal about herself—in the power of the individual whose privacy is at stake.") (upholding DOJ refusal to disclose documents that identified FBI agents) (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989) (informational privacy "encompass[es] the individual's control over information concerning his or her person") (upholding DOJ refusal to disclose prior arrest record of individual under Exemption 7(C))).

²⁷ The closest case appears to be *Brady-Lunny v. Massey*, 185 F. Supp. 2d 928, 932 (C.D. Ill. 2002) (citing Exemption 7(C) in allowing Illinois state officials to withhold names of federal detainees held in state facility, "[s]ome of [whom were] . . . merely witnesses and detainees who ha[d] not been charged with or convicted of crimes," since releasing information about them would "stigmatize" them

ever, repeatedly upheld the government's use of the exemption to withhold the identities of *past* targets of criminal investigations, noting the embarrassment that can result from public knowledge that an individual was once investigated for or suspected of crime.²⁸ Suspects in ongoing criminal investigations also find their names protected from disclosure under Exemption 7(C).²⁹ Assuming as we have that public knowledge of one's post-9/11 immigration detention can be as stigmatizing as public knowledge of one's status as a criminal arrestee or suspect, the exemption thus might encompass the privacy interest the DOJ asserts.³⁰ For the DOJ not to name

and "cause what could be irreparable damage to their reputations"). In ruling for the plaintiffs in the Michigan suit seeking the opening of immigration proceedings involving a post-9/11 detainee, the trial court mentioned the DOJ's privacy argument but noted that the name of the detainee at issue at already been disclosed, and thus did not address the argument. *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, 947 (E.D. Mich. 2002).

²⁸ See, e.g., *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, 1205 (D.C. Cir. 1991) ("There is little question that disclosing the identity of targets of law-enforcement investigations can subject those identified to embarrassment and potentially more serious reputational harm. . . . Recognizing this danger, Exemption 7(C) affords broad[] privacy rights to suspects, witnesses, and investigators" (internal citations and quotations omitted)) (declaring names and addresses of private individuals appearing in law enforcement files categorically exempt from disclosure under Exemption 7(C) absent showing that disclosure is necessary to confirm or refute compelling evidence that agency is engaged in illegal activity). See also *Neely v. FBI*, 208 F.3d 461 (4th Cir. 2000) (remanding for trial court to consider privacy interests of individuals including "third-party suspects" under Exemption 7(C) before ordering disclosure); *Halpern v. FBI*, 181 F.3d 279, 297 (2d Cir. 1999) (noting, in terms of Exemption 7(C), strong privacy interests individuals have in government information that suggests they were once subject to criminal investigation).

²⁹ See, e.g., *Spirko v. United States Postal Serv.*, 147 F.3d 992, 994-95, 997, 999 (D.C. Cir. 1998) (upholding redaction under Exemption 7(C) of information about possible suspects in ongoing criminal investigation).

³⁰ Less clear is whether the invasion of that interest would be "unwarranted" for the purposes of the exemption—i.e., whether public interest in the names of the detainees outweighs the invasion of personal privacy that naming them might constitute. Is there greater public interest in the names of individuals who are *currently detained* by the government for investigation than there is in the names of suspects who are not? If so, is that interest sufficient to justify the privacy invasion of naming them? In my forthcoming work, I answer "no" to the second question (though "perhaps" to the first), in support of my argument for withholding the names of criminal arrestees and suspects until a probable cause determination is made. Reza, *supra* note 9. My reason is that public knowledge of the *identities* of individuals currently being investigated by the government, detained or not, is not necessary, or at least is not *necessarily* necessary, to the public's understanding of government operations—the very purpose of public access to government information to begin with. At least one source more authoritative than I am has also suggested this. See *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 108-09 (1979) ("It is difficult to understand how publication of [an accused] youth's name is in any way necessary to performance of the press' 'watchdog' role.") (Rehnquist, C.J., concurring in judgment striking down state statute criminalizing identification of accused juvenile delinquent when press had acquired the information through lawful investigative efforts). Rulings in FOIA cases also imply this answer, by upholding the deletion of only *identifying* information from documents the government seeks to withhold under Exemption 7(C). See, e.g., *Mays v. DEA*, 234 F.3d 1324, 1327-28 (D.C. Cir. 2001) (noting that the exemption targets identifying information and remanding for determination of whether such information can be redacted from withheld documents). And the FOIA statute itself lends support. See 5 U.S.C. §552(b) (2000) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . .").

post-9/11 immigration detainees who prefer anonymity—and an Amnesty International report about the detainees indicates that many do³¹—is therefore arguably justifiable under Exemption 7(C). But other post-9/11 immigration detainees might choose to make the fact of their detention public, indeed already have.³² Detainees who prefer publicity of that fact disavow any privacy interest in it. Exemption 7(C) therefore cannot support withholding their names. And the DOJ cannot determine which group a given detainee belongs to—which names it can withhold on privacy grounds and which it cannot; who wants to be named, and who does not—without determining each detainee's wishes. Thus, the fundamental shortcoming of the DOJ's privacy argument is the DOJ's failure to consult detainees to determine their wishes and to withhold or release their names accordingly, absent legitimate other grounds for withholding them. Both FOIA and the very meaning of informational privacy compel this.

The second problem with the DOJ's privacy argument compounds the first: all indications are that the DOJ has significantly impaired the ability of detainees to bring publicity to their status on their own. DOJ officials have repeatedly stated that detainees are free to disclose their own names if they wish,³³ but the same Amnesty International report details otherwise: lawyers and family members have had difficulty contacting detainees and determining where, and even whether, they are being held;³⁴ detainees and their attorneys have gone weeks, sometimes months, without being notified of the charges against them or even told whether the charges are criminal or immigration-related;³⁵ detainees' "ability to maintain contact with the outside world" via phone calls has been significantly limited;³⁶ and detainees have reported difficulty understanding their rights and the means of exercising them because of language difficulties.³⁷ Detainees have also apparently gone weeks, and some of them months, without legal counsel;³⁸ a "significant number" of detainees was possibly still without legal counsel

³¹ AMNESTY INTERNATIONAL REPORT, *supra* note 2.

³² See, e.g., *id.* at 29 (discussing "letters from prison" by detainee Rabi[h] Haddad); Steven Fainaru, *Detainees Offer Glimpse of Life in N.Y. Facility; 3 in Sept. 11 Probe Say They Were Abused in Top Security*, WASH. POST, Apr. 17, 2002, at A1 (reporting descriptions of conditions of post-9/11 confinement by three named recently-released detainees).

³³ See Ashcroft, *supra* note 1 and accompanying text; DOJ FOIA Memorandum, *supra* note 5, at 23; 67 Fed. Reg. 19,508, 19,509-19,510 (Apr. 22, 2002) (discussing new regulation, 8 C.F.R. § 236.6, forbidding disclosure of information about immigration detainees) (regulation discussed *supra* notes 17 & 20).

³⁴ See AMNESTY INTERNATIONAL REPORT, *supra* note 2, at 5, 7.

³⁵ *Id.* at 5.

³⁶ *Id.* at 15, 18-20.

³⁷ *Id.* at 16, 23-24.

³⁸ *Id.* at 18.

as of late February 2002.³⁹ Detainees who do not have access to lawyers, family members, and even telephones cannot very well “make their identity public if they wish,” and detainees who do not know what they are charged with, do not understand their lawyers, or do not have lawyers at all cannot meaningfully decide whether to name themselves in the first place. The very circumstances of their detention thus effectively deprive post-9/11 detainees of the ability to vindicate their personal privacy interest—their right to control information about themselves. The DOJ is thus not advancing this interest by withholding their names but defeating it—in fact inverting it.

Both the weight and the sincerity of the DOJ’s privacy argument are also questionable. The government has readily named post-9/11 detainees suspected of much more serious offenses than immigration violations.⁴⁰ Surely the stigma and related harms from that public identification have been greater for those detainees than could be the case for anyone named as merely a possible immigration-law violator. And the government’s post-9/11 concerns about detainee privacy apparently do not extend to those detainees whose attorney-client communications the government intends to listen in on under the post-9/11 regulation allowing such monitoring,⁴¹ or to those suspects toward whom the government will direct the new search and surveillance powers it obtained under the USA PATRIOT Act.⁴² Indeed, the inescapable impression is that *secrecy*, not privacy, is

³⁹ *Id.*

⁴⁰ See, e.g., David Johnston & James Risen, *Officials Say 2 More Jets May Have Been in the Plot*, N.Y. TIMES, Sept. 19, 2001, at B1 (reporting government statement that named San Antonio radiologist was detained as material witness); David Johnston & Philip Shenon, *F.B.I. Curbed Scrutiny of Man Now a Suspect in the Attacks*, N.Y. TIMES, Oct. 6, 2001, at A1 (reporting government statements of suspicion that pre-9/11 immigration detainee Zacarias Moussaoui was suspected of being twentieth hijacker); Ross E. Milloy, *F.B.I. Holds Men Traveling with Knives*, N.Y. TIMES, Sept. 15, 2001, at A2 (reporting FBI’s naming of, and suspicion of 9/11 involvement by, two immigration detainees who had been seized on September 12 on a train in Texas with box cutters, hair dye and a large amount of cash after having been on a flight from Newark to San Antonio on September 11); James Sterngold, *Man Linked to Hijackers Is Granted Bail; San Diego Muslims Put Up Money*, N.Y. TIMES, Nov. 21, 2001, at B7 (reporting government statements that named post-9/11 detainee charged criminally with falsifying his application for political asylum had assisted 9/11 hijackers and had “radical Islamic writings” in his San Diego apartment); cf. James Sterngold, *Muslims in San Diego Waver on Bail Pledge*, N.Y. TIMES, Dec. 9, 2001, at B6 (describing reluctance of Muslims in San Diego area to provide promised bail money to post-9/11 detainee out of fear of being “stigmatized” through association with him). See also Judith Miller, *Pakistani Plotted to Bomb Florida Power Plants, Officials Say*, N.Y. TIMES, Mar. 26, 2002, at A13 (reporting government statements detailing early 2002 immigration arrest of, and DOJ decision not to criminally prosecute, named 19-year-old South Florida man suspected of conspiring with others in March and April 2001 “to acquire guns and explosives for a jihad against the United States”); *Qatar Student in Virginia Will Remain in Jail*, N.Y. TIMES, May 11, 2002, at A12 (repeating government’s descriptions of evidence suggesting connection to 9/11 attacks by named visa-fraud arrestee).

⁴¹ See 66 Fed. Reg. 55,065 (Oct. 31, 2001) (to be codified at 28 C.F.R. § 501.3(c) & (d)).

⁴² See NANCY CHANG & CTR. FOR CONSTITUTIONAL RIGHTS, SILENCING POLITICAL DISSENT:

what the government seeks by withholding information about its post-9/11 law-enforcement efforts.⁴³ Nor is post-9/11 law enforcement the only area in which the current administration has apparently confused the two concepts.⁴⁴ Thus, while there may be legitimate reasons for withholding the names of post-9/11 detainees, DOJ concern for their privacy is plainly not one of them.

II. ITS WRONGS FOR THE POST-9/11 DETAINEES

The DOJ's withholding of the post-9/11 immigration detainees' names has in this way inverted any privacy interest the detainees may have in the fact of their detention. Indeed it has *perverted* that interest, since professed concern for detainee privacy has contributed to the apparent deprivation of a wealth of other rights the detainees are accorded under domestic and international law. Amnesty International's report details the precise conditions of the detentions and the relevant alleged legal violations: racial discrimination, in violation of the United States Constitution and the International Covenant on the Elimination of all Forms of Racial Discrimination;⁴⁵ arbitrary arrest and detention, in violation of the International Covenant on Civil and Political Rights;⁴⁶ restrictions on visitors and communication

HOW THE USA PATRIOT ACT UNDERMINES THE CONSTITUTION 4-9 (2002) (summarizing new law-enforcement search and surveillance powers), available at http://www.ccr-ny.org/whatsnew/usa_patriot_act.asp (on file with the Connecticut Law Review). Concern about informational privacy has not been a hallmark of the current administration in other areas. See, e.g., Robert Pear, *Bush Acts to Drop Core Privacy Rule on Medical Data*, N.Y. TIMES, Mar. 22, 2002, at A1 (reporting on proposal by current administration to drop federal rule promulgated by previous administration requiring doctors and hospitals to obtain consent from patients before using or disclosing medical information for the purpose of treatment or reimbursement).

⁴³ See, e.g., Elizabeth Becker, *Ridge Briefs House Panel, But Discord Is Not Resolved*, N.Y. TIMES, Apr. 11, 2002, at A23 (noting Congressional concern over administration's "excessive secretiveness with the Congress" regarding post-9/11 security efforts by homeland security director Tom Ridge); Linda Greenhouse, *Executive Decisions: A Penchant for Secrecy*, N.Y. TIMES, May 5, 2002, at D1 (discussing administration's efforts to withhold information about post-9/11 law-enforcement efforts); Matthew Purdy, *Their Right? To Remain Silent*, N.Y. TIMES, May 1, 2002, at B5 (discussing the closure of post-9/11 immigration hearings despite the apparent lack of connections to terrorism); Diana Jean Schemo, *Plans on Foreign Students Worry College Officials*, N.Y. TIMES, Apr. 18, 2002, at A15 (noting concerns of education officials that post-9/11 interagency efforts to change rules for student visas are "largely hidden from public view").

⁴⁴ See, e.g., Stephen Labaton & Richard A. Oppel, Jr., *Bush Says Privacy Is Needed on Data from Enron Talks*, N.Y. TIMES, Jan. 29, 2002, at A1 (discussing President's refusal to disclose to Congress information about contacts between failed energy corporation and administration's energy task force); Don Van Natta, Jr., *White House Could be Sued on List Access; Agency Seeking Names of Energy Consultants*, N.Y. TIMES, Jan. 26, 2002, at C1 (describing Vice President Cheney's desire to protect the privacy of individuals interviewed by the energy task force in order to ensure officials' cooperation in the future).

⁴⁵ See AMNESTY INTERNATIONAL REPORT, *supra* note 2, at 1-5, 10-16.

⁴⁶ See *id.* at 6 (citing international laws describing protection against arbitrary deprivation of liberty as important human right).

with the outside world, in violation of the International Covenant on Civil and Political Rights and INS Detention Standards;⁴⁷ deprivation of the right to counsel, in violation of the American Convention on Human Rights;⁴⁸ failure to inform detainees of the charges against them and their rights in a language they understand, in violation of the letter of the United Nations Body of Principles and the spirit of the INS Detention Standards;⁴⁹ and prolonged solitary confinement and other mistreatment in detention, in violation of the International Covenant on Civil and Political Rights.⁵⁰ A civil rights lawsuit filed on behalf of post-9/11 detainees adds, among other things, allegations of unreasonable detention under the Fourth Amendment, violations of due process and equal protection under the Fifth Amendment, and deprivations of the Sixth Amendment right to counsel and the First Amendment right to the free exercise of religion.⁵¹ The secrecy with which the government has operated vis-à-vis the detainees has enabled it to effect these alleged deprivations. Without the pressure of public scrutiny of its actions, the DOJ has possibly violated domestic and international rules and has done so with impunity, at least thus far. Withholding the names of detainees and other information about them has been one lever for this unchecked government power, and the argument for the detainees' personal privacy has been one of the operating mechanisms of this lever. In this way the DOJ has perverted the detainees' privacy interest.

III. VINDICATING THE PERSONAL PRIVACY INTEREST OF POST-9/11 DETAINEES

The DOJ can easily protect the privacy of post-9/11 immigration detainees by letting the detainees themselves decide whether or not they wish to be named, and withholding or releasing their names according to those wishes. This method is already embodied in immigration provisions that protect the privacy of other subjects of immigration law enforcement. Applicants for asylum can consent to the release of information pertaining to their applications,⁵² subjects of exclusion hearings can request open hearings,⁵³ and proceedings involving "abused alien spouses" can be opened if

⁴⁷ See *id.* at 28-30 (describing instances of harsh detention, including prolonged solitary confinement).

⁴⁸ See *id.* at 15-17 (describing instances of denied access to legal counsel).

⁴⁹ See *id.* at 23-25 (describing inadequate or nonexistent access to interpreters or translators).

⁵⁰ See *id.* at 33-40 (describing allegations of physical and verbal abuse, including "inhuman physical restraints" on detainees).

⁵¹ *Turkmen v. Ashcroft*, 02-CV-02307-JG (E.D.N.Y. 2002), available at <http://news.findlaw.com/hdocs/docs/terrorism>.

⁵² 8 C.F.R. § 208.6(a) (2001); see also *supra* note 17.

⁵³ *Id.* § 240.32(a); see also *supra* note 17.

the spouse agrees⁵⁴—in fact, immigration judges are *required* to ask abused alien spouses whether they request closed proceedings.⁵⁵ Broader legislative precedent for giving the privacy decision to the concerned individual also exists.⁵⁶ And a judge presiding over one of the post-9/11 lawsuits against the DOJ has now noted precisely that shortcoming of the DOJ's privacy argument in rejecting the DOJ's efforts to close post-9/11 immigration proceedings.⁵⁷ Indeed, the DOJ *must* determine the wishes of post-9/11 detainees in order to comply with FOIA's disclosure mandate, since, as argued above, FOIA *compels* the DOJ to release detainees' names in response to FOIA requests (absent other grounds for withholding the names) if the detainees so wish. I, moreover, would argue that even if FOIA did not require it, the government should base its disclosure decisions on the wishes of individual detainees, withholding the names of those who do not wish to be named and releasing the names of those who do. Only this method properly vindicates a detainee's privacy interest in the fact of his detention.

IV. CONCLUSION

Privacy concerns of the post-9/11 immigration detainees are thus properly addressed not by the DOJ's unilateral decision to withhold the detainees' names but by the DOJ's release or withholding of the names according to the wishes of the detainees. The DOJ's present stance has inverted detainees' privacy interest by taking from them the power to control information about themselves—the fact of their detention. And the DOJ has perverted that interest by invoking it to strip away other rights from the detainees—the very people for whom the DOJ professes such concern. Post-9/11 immigration detainees might very well have a privacy interest in the fact of their detention, but so far the DOJ is not vindicating that interest by deciding on its own to withhold their names.

⁵⁴ *Id.* § 3.27(c); *see also supra* note 17.

⁵⁵ *Id.* § 240.11(c)(3)(i); *see also supra* note 17.

⁵⁶ *See, e.g.,* Privacy Act of 1974, 5 U.S.C. § 552a(b) (2000) (allowing disclosure of personal records maintained by government upon written consent of person to whom records pertain); CAL. PENAL CODE § 293(a) (2002) (requiring law-enforcement officials to inform sex-offense complainant of option to request that complainant's name not become matter of public record).

⁵⁷ *See* North Jersey Media Group, Inc. v. Ashcroft, 205 F. Supp. 2d 288, 301 (D. N.J. 2002) (to extent Creppy Memorandum, directing closure of post-9/11 immigration proceedings, *see supra* note 20, rests on concerns about detainee privacy, "its mandates sweep too broadly because it does not permit the individual to elect such protective treatment").

